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In The

Supreme Court of the United States

October Term, 1997

PAINTERS LOCAL UNION NO. 109 PENSION FUND and JAMES KING, LARRY CURTICE and ROBERT BRIGGS, JR., IN THEIR CAPACITIES AS TRUSTEES FOR PAINTERS LOCAL UNION NO. 109 PENSION FUND,

Petitioners,

v.

SMITH BARNEY, INC. and ROBERT NIXON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a pension fund be denied access to federal courts for its ERISA claim based upon a separate case involving the same parties which resulted in a remand to state court because the fund advisors "artfully pled" a state contract action and avoided references to ERISA issues?

2. Can a pension fund be denied access to a federal forum for its ERISA claim based upon Section 15 in the NASD's Code of Arbitration Procedure?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Painters Local Union No. 109 Pension Fund and James King, Larry Curtice and Robert Briggs, Jr., in their capacities as Trustees for Painters Local Union No. 109 Pension Fund, (hereinafter "Petitioners") respectfully pray that a writ of certiorari be issued to review the judgment and opinion entered in this cause on January 7, 1998, by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Eighth Circuit (hereinafter the "Eighth Circuit") is reported at 133 F.3d 590 (8th Cir. 1998), and is reprinted in full in the appendix hereto at App. 1-4.

The Memorandum Opinion and Order of the United States District Court for the District of Nebraska (W. Cambridge) (8:CV96-545) is not reported, but is reprinted in full in the appendix hereto at App. 5-10.

The Memorandum and Order of the United States District Court for the District of Nebraska (W. Cambridge) (8:CV96-178) is reported at 976 F.Supp. 1293, and is reprinted in full in the appendix hereto at App. 11-13.

The Memorandum and Order of the Magistrate Judge for the District of Nebraska (T. Thalken) (8:CV96-178) is not reported, but is reprinted in full in the appendix hereto at App. 14-23.

JURISDICTION

Petitioners seek review of the decision of the Eighth Circuit entered on January 7, 1998, dismissing the appeal and therefore affirming the District Court's order dismissing the Petitioner's two-count complaint. Count I of the complaint was an Employee Retirement Income Security Act (hereinafter ERISA) cause of action and Count II was a Motion to Compel Arbitration.

Petitioners filed a petition for rehearing/rehearing en banc on or about January 19, 1998. Said petition was denied on the 6th day of February, 1998.

Jurisdiction is conferred upon this Court to review the January 7, 1998 judgment of the Eighth Circuit by 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

U.S. Constitution – Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution – Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. § 1113 provides:

Limitations of actions

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –

(1) . . . .

(2) . . . .

Except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1132(e) provides:

Jurisdiction

Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction

and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1144(a) provides:

Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of the subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

9 U.S.C. § 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 4 provides:

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

STATEMENT OF THE CASE

In December, 1995, the Petitioners filed an arbitration claim with the National Association of Securities Dealers (hereinafter the "NASD") arbitration forum.

The Petitioners and Respondents had executed agreements which provided, in relevant part: . . . "any controversy arising out of or relating to this account, . . . shall be settled by arbitration in accordance with the Rules then in effect, of the National Association of Securities Dealers, . . . "[1]

[1] The text of the agreement is set forth at App. 24.

Respondents eluded their arbitration obligation by filing an action in state court in Nebraska. The Respondents "artfully pled" their state court petition so as to avoid all references to ERISA (29 U.S.C. § 1001 et seq. Employee Retirement Income Security Act) (despite the fact that the arbitration claim asserted several violations of ERISA). Respondents alleged that the "purchase date" was a controlling factor in deciding whether the ERISA claims were eligible for arbitration under the NASD's Section 15 and, that a court, and not the arbitrators, should interpret the NASD's Section 15. In relevant part, Section 15 states: "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy." (NASD Section 15 has now been renumbered NASD Rule 10304.)[2]

The NASD's Section 35 states:

"The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties."[3]

The Respondents characterized their petition as a "state contract action".

Petitioners requested removal to federal court because any ruling would directly relate to a pension right under 29 U.S.C. § 1104, 1132(e) and 1144(a) et seq.

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[2] Text of Section 15 at App. 25.

[3] Text of Section 35, *FSC Securities v. Freel*, 14 F.3d 1310, 1312 (8th Cir. 1994).

ERISA. The Magistrate Judge and District Court remanded the case to state court for a decision on arbitrability. (Case no. 8:CV96-178).[4] In its remand order, the District Court stated that there were no ERISA issues on the face of the petition (and the court could not look beyond the face of the petition), and therefore the Nebraska state courts were to decide arbitrability issues.

The Petitioners then filed a two-count complaint alleging (1) ERISA violations and (2) a motion to compel arbitration. (Case no. 8:CV96-545). The District Court held that the first count was made simply to assert jurisdiction for count II (the court said it must look at 8:CV96-178) and dismissed the cause of action asserting it had already (case 178) decided it couldn't decide the merits.[5]

The Eighth Circuit Court of Appeals affirmed the District Court's decision by dismissing the appeal. The Eighth Circuit held the two-count complaint was a non-appealable collateral attack under 28 U.S.C. § 1447(c). See case synopsis at App. 26.

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[4] Text of orders at App. 11-23.

[5] Text of order on 8:CV96-545 at App. 5-10.

REASONS FOR GRANTING THE WRIT

I. Can A Pension Fund Be Denied Access To Federal Courts For Its ERISA Claims Based Upon A Separate Case Involving The Same Parties Which Resulted In A Remand To State Court Because The Investment Advisors "Artfully Pled" A State Contract Action And Avoided References To ERISA Issues?

This case presents significant issues relating to the rights and remedies available under ERISA, 29 U.S.C. § 1001 et seq. for pension funds against their investment advisors.

The Magistrate Judge determined, in a case entitled 8:CV96-178, that the investment advisor could "artfully plead" a state contract cause of action in response to the pension fund's arbitration claim asserting ERISA violations and avoid federal jurisdiction. The District Court said, in affirming, it could only look at the "face of the petition" and not the underlying dispute.[6] (The real issue was whether ERISA preempted any limitation on arbitration eligibility, specifically the NASD's Section 15, which might shorten the time period in which an aggrieved party could bring a claim.) The District Court gave no consideration to the NASD's Section 35.

The District Court was aware that the Fifth Circuit had already determined federal question jurisdiction and preemptive effect of ERISA on the same issue. In fact, the corporate defendant here was the defendant (Smith Barney Shearson) in the Fifth Circuit case. Smith Barney Shearson argued federal jurisdiction in the Fifth Circuit

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[6] Memorandum and Order at App. 11.

and ERISA's preemption: *Kramer v. Smith Barney,* 80 F.3d 1080, 1083 (5th Cir. 1996).

In the Nebraska District Court, (8:CV96-178), Smith Barney argued state jurisdiction. Smith Barney sought to avoid *FSC Securities v. Freel,* 14 F.3d 1310 (8th Cir. 1994).

The District Court noted that the Fifth Circuit case was not precedent and ruled opposite the Fifth Circuit.[7] The Magistrate judge and the District Court both asserted there was no ERISA issue.[8]

Since the procedural posture of 8:CV96-178 was a removal action, the Eighth Circuit would not entertain either an appeal or writ of mandamus. 28 U.S.C. § 1447 (c).

Since the District Court (and Magistrate Judge) refused to acknowledge ERISA issues, the Pension Fund filed its own action (8:CV96-545). The action was a two-count petition: Count I asserting ERISA violations (29 U.S.C. § 1104 et al.); and Count II, a request for an order to compel arbitration (9 U.S.C. § 4).

The District Court rejected federal jurisdiction suggesting that Count I was pled as immaterial (despite that count being consistent with the claims asserted in the arbitration action).[9] Further, that Count II, arbitration, had no independent basis for jurisdiction. The Court dismissed case 8:CV96-545 for lack of federal jurisdiction based upon 8:CV96-178.

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[7] Memorandum and Order at App. 11.

[8] Memorandum and Order at App. 19-21.

[9] Memorandum Opinion and Order at App. 8.

What happened to the concept of only looking to the face of the petition (complaint) that the District Court articulated in 8:CV96-178?[10] The District court referred to 8:CV96-178 extensively in its "Background" and concluded it precluded 8:CV96-545.[11] The District Court cited *Bell v. Hood*, 327 U.S. 678 (1946) as authority for its dismissal. However, *Bell v. Hood* found federal jurisdiction and reversed the lower courts.

The case (8:CV96-545) was appealed to the Eighth Circuit. The Eighth Circuit held "The present action has the same issues and the same parties as the original action. This makes it a collateral attack on the original remand order. It is improper for the Fund to do collaterally that which it could not do directly. See *New Orleans Public Service, Inc. v. Majorie*, 802 F.2d 166, 168 (5th Cir. 1986) (per curium)."[12]

Collateral estoppel requires identical issues and the same parties. There may be the same parties in 8:CV96-178 as 8:CV96-545 but there are ***no*** identical issues. The Magistrate Judge said in 8:CV96-178: "There were no federal issues".[13] The District Court agreed.[14]

Case 8:CV96-545 was solely federal: Count I – 29 U.S.C. § 1104 et al. and Count II – 9 U.S.C. § 4.

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[10] Memorandum and Order at App. 11.

[11] Memorandum Opinion and Order at App. 5-10.

[12] Memorandum Opinion and Order at App. 3.

[13] Memorandum and Order (T. Thalken) at App. 18-21.

[14] Memorandum and Order (W. Cambridge) at App. 12.

The Eighth Circuit permitted the District Court to conclude in case 8:CV96-178 that no federal issues were involved, thus remand; and dismiss 8:CV96-545 (clearly a federal preempted statutory cause of action (*Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 95 L.Ed.2d 55, 107 S.Ct. 1542 (1987)), based on 8:CV96-178 – alleging collateral estoppel.

Petitioners believe they have been denied due process and equal protection of the U.S. Constitution, Amendments 5 and 14.

Petitioners believe 29 U.S.C. § 1132(e) requires the federal courts to accept jurisdiction of 8:CV96-545. Surely Congress did not intend to create exclusive federal jurisdiction, an exclusive federal action 29 U.S.C. § 1132(e), and then have a federal district court dismiss such action based upon a notion that a contract interpretation of the NASD Section 15 could **eliminate** these federal rights. (8:CV96-178)

In *Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990) the Court discussed both the procedural and substantive due process clauses of the Fourteenth Amendment. This action demonstrates a denial of substantive due process in the denial of an exclusively federal cause of action by a federal court.

This action involves a deprivation of procedural due process in that the specific forum Congress directed to hear the complaints alleged have been denied by that very forum.

Petitioners believe they have been denied equal protection of law. Pension funds in the Fifth Circuit can bring

a cause of action in an arbitration forum based upon *Kramer v. Smith Barney*. In the Eighth Circuit, it will be a race to the forum – if one files an action in state court first, any action in federal court will be denied. *Painters v. Smith Barney*, 133 F.3d 590 (8th Cir. 1998).

The geographic distinction appears to offend the constitution and federal statutory law and now creates a new split among the circuit courts.

II. Can a Pension Fund Be Denied Access To a Federal Forum For Its ERISA Claims Based Upon Section 15 In The NASD's Code Of Arbitration Procedure?

In *Boggs v. Boggs*, 117 S.Ct. 1754 (1997) the U.S. Supreme Court decided a state law would not void ERISA. In this case, the Eighth Circuit holds a mere rule of an arbitration forum can void ERISA. (The decision comes via a dismissal of the appeal letting stand the District Court's voiding of an ERISA cause of action based on another case (8:CV96-178)).

The Eighth Circuit summed its analysis by noting "The Fund then filed the present federal action, again alleging jurisdiction based on ERISA. The new action was dismissed for lack of subject-matter jurisdiction. The Fund's appeal of this dismissal is currently before the court. **However, the analysis must begin with the remand of the first case.**" (emphasis added)

The first case was a reference to a totally different case with totally different issues, according to the district court. The "first case" was case 8:96CV-178. In that case, both the Magistrate Judge and District Court held no ERISA issues.

Of great significance is the District Court's analysis: "Federal subject-matter jurisdiction is not apparent from the face of the petition, and could only be invoked by looking to the underlying dispute. The Magistrate Judge found that to be an improper method of obtaining jurisdiction in this case, and I agree with his conclusions."[15] The District Court refused to examine the motivation or real underlying controversy. The District Court ordered remand allowing the state court to now rule on and foreclose Petitioner's ERISA claims.

Ironically, when the petitioners filed their own complaint (ERISA cause of action – 8:CV96-545) the District Court changed its analysis. Instead of only looking at the face of the complaint, the District Court now looked at the "first case" (8:96CV-178) and speculated on the motives of the Petitioner's cause of action. The District Court, citing *Bell v. Hood*, 327 U.S. 678 (1946), stated ERISA was a ruse to get jurisdiction for its motion to compel arbitration (9 U.S.C. § 4).

The District Court ignored the specific allegations of wrongdoing in Count I, with specific ERISA violations. Never did the District Court review the arbitration claim to confirm Petitioner's allegations.[16]

This case involves issues of arbitrability, 9 U.S.C. § 2 et seq., as it interacts with particular rules of an arbitration forum (NASD, Section 15) and federal law (ERISA, 29 U.S.C. § 1132(e) and 1144(a) et seq.).

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[15] Memorandum and Order at App. 13.

[16] Memorandum Opinion and Order at App. 8.

The Circuits are evenly split upon the issue of whether arbitrators or the courts shall interpret and decide NASD Section 15. In this case, the Eighth Circuit has begun a new split among the Circuits by permitting a state court to decide an arbitrability issue which could void substantial preempted federal rights found in ERISA by violating the due process and equal protection clause of the Fifth and Fourteenth Amendments to the United States Constitution.

In *Mastrobuono v. Shearson*, 115 S.Ct. 1212, 1219 (1995) the Supreme Court has already provided guidance concerning arbitration agreements with broad language concerning the scope of issues to be arbitrated. In *Doctors Associates Inc. v. Casarotto*, 517 U.S. ___, 134 L.Ed.2d 902, 116 S.Ct. (1996) the U.S. Supreme Court was compelled to instruct a state court to put aside their hostility toward arbitration. In this case, the U.S. Supreme Court should insist on no less a standard from the federal courts. That is, federal courts are required to accept congressionally mandated causes of action; that no state law or arbitration rule can void a preempted federal law. *Boggs v. Boggs*, 117 S.Ct. 1754 (1997); *Volt Information Services, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24-25 (1983) and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983).

In *Volt*, 489 U.S. at 476, the Court directed that when a court interprets provisions in an agreement, "due regard must be given to the federal policy favoring arbitration and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration."

In *First Option of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 1924-25 (1995), the Supreme Court examined the analysis that courts were to apply when examining issues related to arbitrability versus the scope of a merits-related dispute.

In this case, the Court has a clear arbitration agreement with the provision that "any controversy" shall be arbitrated. Yet the lower federal courts permit a state court action to possibly void the Federal Arbitration Act (hereinafter FAA), *Mastrobuono* and *First Options*, by refusing to accept jurisdiction of this matter.

In *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), this court held: Under the Federal Arbitration Act, 9 U.S.C. § 1, et seq., there is a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary".

The Eighth Circuit has failed to follow this Court's direction by dismissing Petitioner's ERISA cause of action. The Eighth Circuit's decision is the exact opposite of the conclusion reached in the Fifth Circuit (with the same corporate respondent in the Fifth Circuit). *Kramer v. Smith Barney*, 80 F.3d 1080 (5th Cir. 1996).

The Eighth Circuit ignores the Congressional mandate, 29 U.S.C. § 1132(e), which requires ERISA actions to be brought in federal district court.

In the Fifth Circuit, *Kramer v. Smith Barney*, 80 F.3d 1080, 1083 (5th Cir. 1996), the same corporate respondents as here (Smith Barney Shearson) argued that a state

petition, which made no ERISA allegations, was in fact governed by ERISA and was a federal cause of action.

Without review from the U.S. Supreme Court, a new wave of arbitration litigation will engulf the courts of this country. The broker/dealers will forum shop, either state court or federal court, depending on the current status of the holding (if any) on the NASD's Code of Arbitration Section 15 issue.

The NASD's Code of Arbitration, Section 15, has evenly split the Circuits. Circuits holding that Section 15 is an arbitrator decision include: *PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 753-54 (5th Cir. 1995); *FSC Securities Corp. v. Freel*, 14 F.3d 1310, 1312 n. 2 (8th Cir. 1994); *PaineWebber Inc. v. Bybyk*, 8 F.3d 1193, 1196, 1198-99 (2d Cir. 1996) and *O'Neel v. National Association of Securities Dealers, Inc.*, 667 F.2d 804, 807 (9th Cir. 1982).

Those Circuits holding that the NASD's Section 15 is a court decision include: *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 478-81 (10th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 383-84 (11th Cir. 1995); *PaineWebber Inc. v Hoffmann*, 984 F.2d 1372, 1378 (3rd Cir. 1993); *Roney and Co. v Kassab*, 981 F.2d 894, 898-900 (6th Cir. 1992) and *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 512-13 (7th Cir. 1992).

Who interprets an arbitration rule should have ended with the Supreme Court's ruling in *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. ___, 131 L.Ed.2d 76, 115 S.Ct. 1212 and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920 (1995). However, it has not ended the debate and court resources are continuing to be

flooded with this question. In fact, whether an investor gets to arbitration or is forced into delays and further expenditures in court procedures is a random chance related to lines drawn around federal circuits rather than a uniform right accorded every citizen as Congress intended when it passed the Federal Arbitration Act.

The Eighth Circuit has now opened a new split between the Circuits. This split is guaranteed to consume an inordinate amount of judicial resources (both federal and state) unless the U.S. Supreme Court reviews and reverses the incorrect decision of the Eighth Circuit.

The Eighth Circuit had before it *Kramer v. Smith Barney* and *Boggs v. Boggs*, 117 S.Ct. 1754 (1997). Unable to correctly incorporate *Moses H. Cone Hospital, Boggs v. Boggs* and other guidance from the U.S. Supreme Court, the Eighth Circuit dismissed the Petitioner's ERISA action and request to compel arbitration.

Without review by the U.S. Supreme Court, congressional pension rights will be subordinated to state court or arbitration forum contract rules. In addition, the U.S. Supreme Court's prior holdings on arbitration, 9 U.S.C. § 2, will be diminished and the FAA further limited by state court decisions based on differing state court substantive and procedural interpretations, contrary to *Moses H. Cone Hospital*.

In *Moses H. Cone Hospital* the United States Supreme Court directed there is a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" (p. 24).

In *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986), the court held a party

cannot be held to arbitrate what it has not agreed to arbitrate. In this action, the parties agreed to arbitrate "any controversy".

In *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. ___, 131 L.Ed.2d 76, 115 S.Ct. 1212, 1217 (1995), the U.S. Supreme Court examined the language before the court in this action. The U.S. Supreme Court held "the Court of Appeals misinterpreted the parties agreement. The arbitral award should have been enforced as within the scope of the contract." The Supreme Court examined the contractual arbitration agreement language which noted resolution of "any controversy" and the arbitrator's authority under rule § 3741(e) (1993) – (permitting "damages and other relief"). The U.S. Supreme Court held arbitrators had the power to decide on punitive damages. Here, the respondents argue that the contract language "any controversy" is limited by NASD Code of Arbitration Procedure Section 15. Respondents argue further that NASD Section 15 can shorten the statute of limitations found in ERISA (29 U.S.C. § 1113). That is, a rule of arbitration procedure can void a federal preempted cause of action.

Corporate respondents argued just the opposite of that issue before the Fifth Circuit (*Kramer v. Smith Barney Shearson*, 80 F.3d 1080, 1083 (5th Cir. 1996). Nonsense! Said the Fifth Circuit, holding: "Because application of Rule 605 to render Kramer's ERISA claims ineligible for arbitration would impair his substantive rights, we hold it void with respect to those claims."[17] (Rule 605 is nearly identical to NASD Section 15).

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[17] *Kramer v. Smith Barney* at p. 1085.

In prior decisions of the U.S. Supreme Court, the preemptive and exclusive nature of ERISA has been clarified. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 95 L.Ed.2d 55, 107 S.Ct. 1542 (1987), *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1989), and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 77 L.Ed.2d 490 (1983), 103 S.Ct. 2890. However, in the context of an arbitration claim, respondents have been successful in having the lower courts ignore the U.S. Supreme Court's mandates.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, ___ L.Ed.2d ___ (1995), the U.S. Supreme Court stated, at p. 1924-1925: "Courts should examine whether there is an agreement and what that agreement says." However, in this case, the U.S. Supreme Court should address the next question – What significance does a federal statute have when confronted with a more restrictive arbitration rule? The Fifth Circuit has said the federal statute (ERISA) prevails; the Eighth Circuit says a state court can decide if a rule in an arbitration forum can void ERISA.

In *Boggs v. Boggs*, 117 S.Ct. 1754 (1997), the U.S. Supreme Court appears to have indicated a direction contrary to the Eighth Circuit's position. In *Boggs*, the U.S. Supreme Court reversed a decision of the Fifth Circuit that permitted a state law to reduce the rights granted by ERISA.

Without review by the U.S. Supreme Court, this decision will cause a split of the circuits which either restricts a federal right and makes hollow the FAA's congressional mandate to arbitrate issues, or the U.S. Supreme Court

will reject the Eighth Circuit's decision to permit a contract issue to void a federally preempted statute such as ERISA.

The Eighth Circuit permits two errors:

1. A state court contract action can preclude an ERISA action (preempted federal action); and,

2. A rule in the NASD's code of arbitration procedure can deny petitioner's substantive preempted exclusive federal rights and remedies.

The Eighth Circuit's rule circumvents 29 U.S.C. § 1144(a). The Eighth Circuit's holding permits a state court to void a preempted federal statutory law. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 95 L.Ed.2d 55, 107 S.Ct. 1542 (1987). This holding is contrary to *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 103 S.Ct. 927 (1983) and *Boggs v. Boggs*, 117 S.Ct. 1754 (1997).

Without review by the U.S. Supreme Court, a new wave of litigation in state courts will be commenced to emasculate the FAA and ERISA.

CONCLUSION

Pension funds are now threatened with a denial of due process and equal protection from lower federal courts in the Eighth Circuit.

Congress mandated federal courts as the forum of exclusive jurisdiction on ERISA issues. The U.S. Supreme Court has supported that mandate. The U.S. Supreme Court should grant this petition for review to uphold the constitutional and federal statutory rights of pension funds to present their issues in the proper forum. The U.S. Supreme Court should not permit the frustration of federal statutory and constitutional mandates by lower federal courts. In *Doctors Associates v. Casarotto,* 517 U.S.___, 134 L.Ed.2d 902, 116 S.Ct. 690 (1996) and *Allied-Bruce Terminex Companies, Inc. v. Dobson,* 513 U.S.___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) the U.S. Supreme Court would not permit state courts to infringe upon federal rights. It must now apply the same strict guidance to lower federal courts.

If review is not granted, a host of problems would unravel: A new split among circuits would continue (Fifth v. Eighth); state courts in those circuits following the Eighth Circuit's rule would be allowed to interpret contracts which would easily reduce ERISA and the FAA to hollow federal rights; courts, both federal and state, would be inundated with forum shoppers; and, a "race to the court house" would replace a consistent rational rule of law.

To reinforce the preemptive and exclusive nature of ERISA over state contract law arbitration forum, and to

avoid further divisions among the Circuits, this court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-1832

PAINTERS LOCAL UNION NO. 109 PENSION FUND, AND JAMES KING, LARRY CURTICE, AND ROBERT BRIGGS, JR. IN THEIR CAPACITIES AS TRUSTEES FOR PAINTERS LOCAL UNION NO. 109 PENSION FUND,	*	Appeal from the United States District Court for the District of Nebraska
Plaintiff,	*	
v.	*	
SMITH BARNEY INC. AND ROBERT NIXON,	*	
Defendant.	*	

Submitted November 20, 1997.
Filed: January 7, 1998

Before BOWMAN, MURPHY, Circuit Judges, and CONMY[1], District Judge.

CONMY, District Judge.

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[1] The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota, sitting by designation.

Smith Barney, Inc. & Robert Nixon ("Smith Barney") were involved in the management of the Painter's Local Union No. 109 Pension Fund ("Fund"). The Fund alleges that the managers breached a fiduciary duty to the Fund by dealing in certain securities in which Smith Barney had an ownership interest.

Pursuant to the fund management agreement, the Fund demanded arbitration of this claim before an NASD arbitration panel. Smith Barney refused to arbitrate, stating that the matter was time barred.

On March 18, 1996, Smith Barney sued in the State District Court of Nebraska asking that the Fund be enjoined from compelling arbitration, on the premise that the matter was time barred. The Fund attempted to remove the action to federal court claiming that a federal question was involved as the Fund operation was governed by the provisions of ERISA, which preempted the state court action. The federal district court remanded to state court, and the Fund appealed from the remand order. That appeal was dismissed by this court.

The state court ruled in favor of Smith Barney and issued an injunction prohibiting the Fund from further efforts to enforce arbitration. That decision has been appealed to a Nebraska appellate court and is pending.

The Fund then filed the present federal action, again alleging jurisdiction based on ERISA. The new action was dismissed for lack of subject matter jurisdiction. The Fund's appeal of this dismissal is currently before the court. However, the analysis must begin with the remand of the first case.

A remand decision is generally not an appealable order. *See* 28 U.S.C. § 1447(d). "[W]ith the exception of civil rights cases, 'an order remanding a case to the State court is not reviewable on appeal or otherwise.' The Supreme Court has narrowly construed this restriction, however, and explained that only cases remanded under 28 U.S.C. § 1447(c) are subject to this nonreviewability provision." *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 623 (8th Cir. 1997) (citations omitted). There are two grounds for remand under § 1447(c), (1) defect in the removal procedure, and (2) lack of subject matter jurisdiction. *See Id.*

Both the Magistrate's remand order and the District Judge's affirmance of that order stated that the original action was remanded for lack of subject matter jurisdiction. They addressed the Fund's concern that jurisdiction was conferred by ERISA's preemption of state law. A decision on preemption is still a decision that subject matter jurisdiction is not present. *See Hansen v. Blue Cross Blue Shield of California*, 891 F.2d 1384, 1388 (9th. Cir. 1989) (decision that ERISA did not preempt claims was within the scope of 28 U.S.C. § 1447(c), and therefore not reviewable). Since the original action was remanded under § 1447(c), that decision can not be reviewed.

The present action has the same issues and the same parties as the original action. This makes it a collateral attack on the original remand order. It is improper for the Fund to do collaterally that which it could not do directly. *See New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166, 168 (5th Cir. 1986) (per curium).

Therefore, this matter is not properly before the court and the appeal is dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PAINTERS LOCAL UNION NO. 109 PENSION FUND, and JAMES KING, LARRY CURTICE, and ROBERT BRIGGS, JR., IN THEIR CAPACITIES AS TRUSTEES FOR PAINTERS LOCAL UNION NO. 109 PENSION FUND, Plaintiffs, v. SMITH BARNEY, INC., and ROBERT NIXON, Defendants.	8:CV96-545 MEMORANDUM OPINION AND ORDER (Filed Mar. 17, 1997)

This matter is before the Court on the defendants' motions to dismiss or, alternatively, to stay or to make more definite and certain (filing 13). After considering the matter, the Court finds that the defendants' motion to dismiss should be granted and that both the defendants' motion to stay and the defendants' motion to make more definite and certain should be denied as moot.

Background

On February 20, 1996, Smith Barney, Inc. and Robert Nixon (hereinafter collectively referred to as "Smith Barney") filed a suit against Painters Local Union No. 109

Pension Fund and James King, Larry Curtice, and Robert Briggs, Jr., in their capacities as trustees for Painters Local Union No. 109 Pension Fund (hereinafter collectively referred to as "the Pension Fund") in the District Court of Douglas County, Nebraska. See filing 14, exhibit 3 (petition in *Smith Barney, et al. v. Painters Local Union No. 109 Pension Fund, et al.*, Doc. 947, Page 52) (hereinafter referred to as "the state court case"). In the state court case, Smith Barney alleged that certain claims that the Pension Fund had submitted to arbitration, including the ERISA claim alleged in Count I of the complaint in the action now before this Court, were not eligible for arbitration because the Pension Fund had waited too long before submitting those claims to arbitration. Smith Barney therefore asked the state court to enter judgment declaring as such and to permanently enjoin the arbitration from proceeding.

On March 18, 1996, the Pension Fund removed the state court case to this Court. *See* filing 1 in 8:96CV178. On April 1, 1996, Smith Barney filed a motion seeking to have the state court case remanded to state court. *See* filing 5 in 8:96CV178. After allowing extensive briefing, Magistrate Judge Thalken granted Smith Barney's motion to remand on August 6, 1996, see filing 18 in 8:96CV178, and the undersigned affirmed on appeal Magistrate Judge Thalken's decision on September 27, 1996. See filing 24 in 8:96CV178. In sum, this Court remanded the state court case because the Court found that it lacked subject matter jurisdiction over the state court case. *See generally* filings 18 & 24 in 8:96CV178. Subsequently, the Eighth Circuit denied a petition for a writ of mandamus filed by the Pension Fund and dismissed an appeal filed

by the Pension Fund. *See* filings 32, 34, 35, & 36 in 8:96CV178.

On October 11, 1996, the Pension Fund filed the instant action. *See* filing 1 (complaint). In the complaint, the Pension Fund alleges two counts. In Count I, the Pension Fund alleges the ERISA claim which was submitted to arbitration. In Count II, the Pension Fund asks the Court to compel arbitration of that ERISA claim, as well as the other claims the Pension Fund submitted to arbitration.

In the motion now before the Court, Smith Barney asks, in the alternative, that the Court (1) dismiss the Pension Fund's complaint either (a) for lack of subject matter jurisdiction or (b) for failure to state a claim upon which relief can be granted, (2) stay this action pending the outcome of the state court action, or (3) order the Pension Fund to make Count I of the complaint more definite and certain.

Analysis

The parties dispute whether the Court has subject matter jurisdiction over the Pension Fund's complaint. The Pension Fund asserts that the Court has federal question jurisdiction over Count I of the complaint because it alleges an ERISA claim and that the Court, therefore, has supplemental jurisdiction over Count II of the complaint. Smith Barney, in the motion to dismiss, asserts that the Court lacks federal question jurisdiction over Count I and, therefore, also lacks jurisdiction over Count II.

In *Bell v. Hood*, 327 U.S. 678 (1946), the United States Supreme Court stated that

> where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. . . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous.

Bell, 327 U.S. at 681-83.

The Court finds that Count I of the complaint clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction. It simply cannot be disputed that the *merits* of the Pension Fund's ERISA claim will either (a) be "adjudicated" by an arbitrator or (b) not be "adjudicated" at all because of the amount of time that passed before the Pension Fund submitted the ERISA claim to arbitration. Either way, this Court can not adjudicate the *merits* of the Pension Fund's ERISA claim. By alleging Count I of the complaint, the Pension Fund is seeking to have this Court do something that the Court already decided, in remanding the state court case, that it cannot do, i.e., exercise jurisdiction over the arbitration issue and send the Pension Fund's ERISA claim to an arbitrator. In other words, the Pension Fund has alleged Count I solely in order to get the Court to decide Count II, a count over which the Court has no independent

subject matter jurisdiction. Because Count I of the complaint therefore satisfies the first of the *Bell* exceptions,[1] the Court has no subject matter jurisdiction over Count I of the complaint. In turn, the Court finds that it also lacks supplemental jurisdiction over Count II of the complaint. Accordingly, because the Court finds that it lacks subject matter jurisdiction over the whole of the Pension Fund's complaint, the Court will grant the motion to dismiss and dismiss this action for lack of subject matter jurisdiction.[2]

Order

Based on the foregoing memorandum opinion, it is ordered that

1. the defendants' motion to dismiss (contained in filing 13) is granted;

2. the defendants' motion to stay (contained in filing 13) is denied as moot;

3. the defendants' motion to make more definite and certain (contained in filing 13) is denied as moot; and

4. this action is dismissed for lack of subject matter jurisdiction.

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[1] The Court need not decide whether Count I satisfies the second of the Bell exceptions.

[2] Because the Court finds that the motion to dismiss should be granted on the subject matter jurisdiction ground, the Court need not consider the alternative ground asserted in support of that motion, i.e., that the complaint fails to state a claim upon which relief can be granted.

Dated this 14 day of March, 1997.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SMITH BARNEY, INC., and ROBERT NIXON, Plaintiffs, v. PAINTERS LOCAL UNION NO. 109 PENSION FUND, and JAMES KING, LARRY CURTICE, and ROBERT BRIGGS, JR., in their capacities as Trustees for Painters Local Union No. 109 Pension Fund, Defendants.	8:CV96-178 **MEMORANDUM AND ORDER** (Filed Sept. 30, 1996)

This matter is before the Court on Defendants' appeal (filing 19) of Magistrate Judge Thalken's order (filing 18) granting Plaintiffs' motion to remand this case to state court (filing 5).

The appropriate standard of review is set forth in 28 U.S.C. § 636(b) (1) (A): a district judge "may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." The local rules of procedure provide that, upon appeal, the district judge "shall modify, set aside, or remand to the magistrate judge any nondispositive order or portion thereof found to be clearly erroneous or contrary to law." NELR 72.3(d).

I have carefully reviewed the magistrate judge's memorandum and order, the case law, and the arguments briefed by the parties. I find and conclude that nothing in that order is clearly erroneous or contrary to the law. Accordingly, I will affirm Magistrate Judge Thalken's ruling.

The magistrate judge granted the motion to remand this case to state court because this court lacks subject-matter jurisdiction over the dispute. Well-settled law holds that federal jurisdiction must be apparent from the face of a properly pleaded complaint. A federal defense alone is insufficient to bring the case to federal court. *See, e.g., Gaming Corp. of America v. Dorsey & Whitney,* 88 F.3d 536, 542-43 (8th Cir. 1996); *Hurt v. Dow Chemical Co.,* 963 F.2d 1142, 1144 (8th Cir. 1992). An exception to the well-pleaded complaint rule exists in situations of "complete preemption," when federal law is so dominant in a specific field that it transforms ordinary state law claims into federal claims for purposes of removal jurisdiction. *Gaming Corp.* at 543. ERISA is such a claim. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987).

Despite Defendants' vigorous arguments to the contrary, the case they are attempting to remove from state court does not deal in any more than a tangential fashion with ERISA. This, perhaps, is the key distinguishing feature from *Kramer v. Smith Barney,* 80 F.3d 1080 (5th Cir. 1996).[1] In *Kramer,* the plaintiff had filed his complaint in state court, seeking relief on claims against Smith Barney

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[1] Defendants should not need to be reminded that Fifth Circuit law is not binding in this jurisdiction, regardless of Smith Barney's posture in the case.

and one of its brokers which he had been precluded from arbitrating. The state law claims in that complaint were preempted by ERISA, according to the court, and thus were properly removed to federal court. *Id.* at 1082-84.

In the present case, the state court petition asks for injunctive and declaratory relief under state law provisions, in an effort to enjoin the NASD arbitration sought by the defendants. Federal subject-matter jurisdiction is not apparent from the face of the petition, and could only be invoked by looking to the underlying dispute. The magistrate judge found that to be an improper method of obtaining jurisdiction in this case, and I agree with his conclusions. Therefore, as the magistrate judge's findings and conclusions are not clearly erroneous or contrary to law, his decision will be affirmed.

IT IS ORDERED:

1. Defendants' appeal (filing 19) of Magistrate Judge Thalken's order (filing 18) is denied;

2. The magistrate judge's order (filing 18) remanding this case to state court is affirmed; and

3. The stay (filing 21) that had been in place pending the ruling on this appeal is hereby lifted.

DATED this 27 day of September, 1996.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SMITH BARNEY, INC. and ROBERT NIXON Plaintiffs, vs. PAINTERS LOCAL UNION NO. 109 PENSION FUND, and JAMES KING, LARRY CURTICE and ROBERT BRIGGS, JR., in their capacities as Trustees for Painters Local Union No. 109 Pension Fund, Defendants.	8:CV96-00178 **MEMORANDUM AND ORDER** (Filed Aug. 6, '96)

This matter is before the court on the motion of the plaintiffs, Smith Barney, Inc. (hereinafter "Smith Barney") and Robert Nixon, to remand this case to state court (Filing No. 5). Also before the court are the motions of the defendants for oral argument (Filing Nos. 8 and 15) on the motion to remand. The parties have fully briefed the issues before the court and the motions for oral argument (Filing Nos. 8 and 15) will be denied.

BACKGROUND

In 1986, Painters Local Union No. 109 Pension Fund (hereinafter the "Fund") contacted the brokerage firm of Shearson, Lehman, Hutton (hereinafter "Shearson")[1] with

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[1] Shearson was later purchased by Smith Barney, which assumed all duties and contractual obligations of Shearson. See Plaintiff's Brief at 1.

the intention of having the firm make investments to benefit the Fund. Robert Nixon, an employee of Shearson, was chosen as the investment advisor to handle this account. Nixon signed a contract with the Fund which contained a document stating that all disputes that might later arise between these parties were to be submitted to arbitration before the NASD Arbitration Board, and the conduct of the parties was to be governed by the NASD's rules and bylaws.

During the late 1980s, Nixon made investments for the Fund, but it became dissatisfied at his handling of its affairs; the Fund alleges conflicts of interest, bad financial management and fraud, as well as a violation of duties owed under federal laws such as the Employee Retirement Income Security Act (ERISA). Since the contract specified that the rules of the NASD – a trade organization of which Mr. Nixon is a member – governed, the Fund submitted an arbitration claim to the NASD arbitration authorities on December 15, 1995.

Nixon and his employers responded by filing an action on February 20, 1996 in the District Court of Douglas County, Nebraska, asking that court to enjoin the pending NASD arbitration. The vehicle chosen by the plaintiffs to obtain an injunction of the pending arbitration proceedings was Nebraska's Uniform Declaratory Judgments Act (NUDJA), Neb. Rev. Stat. §§ 25-21,149, *et seq.*

The plaintiffs claimed that, pursuant to the terms of their contract, the Fund's claim was not arbitrable because the NASD rules state that a claim cannot be arbitrated more than six years after the events giving rise

to the claim took place. The plaintiffs argued that the events giving rise to the Fund's claim were the purchases and investments, the last one of which occurred in December 1989, just barely more than six years before the arbitration claim was filed in 1995. The theory on which the plaintiffs sought their injunction was based in the terms of the contract, a theory which necessarily involves the interpretation of the NASD rules.

The Fund replied by disputing that the purchases themselves were the real events that gave rise to the claim; it also argues that under ***FSC Securities v. Freel,*** 14 F.3d 1310 (8th Cir. 1994), the NASD six-year "statute of limitations" is somewhat elastic. In any event, the Fund argues that the NASD arbitration board should be the entity to decide whether or not the claim is arbitrable. The Fund also filed a counterclaim, alleging a breach of contract by the plaintiffs in failing to abide by the apparent agreement to have ***all*** disputes arbitrated by the NASD.

On March 18, 1996, the defendants removed this case from the District Court of Douglas County, Nebraska, to this court. They assert that this court has original subject matter jurisdiction because of the status of the NASD (which was created by the Securities Exchange Act of 1934), and they claim jurisdiction is appropriate pursuant to 15 U.S.C. § 78aa. Alternatively, they argue that federal question jurisdiction exists because of the underlying issues that deal both with securities, over which the federal courts have almost exclusive jurisdiction, the Federal Arbitration Act (FAA), and ERISA. The plaintiffs have responded with the instant motion to remand, arguing that this court has no jurisdiction under the FAA, the

NASD rules, ERISA, or any of the underlying issues in the dispute.

ANALYSIS

The defendants argue that ***FSC Securities Corp. v. Freel***, 14 F.3d 1310 (8th Cir. 1994), is a " 'bullet between the eyes' of Plaintiffs' argument." Defendant's Surreply Brief at 5. That case held that when parties expressly agree to have disputes governed by the NASD Code of Arbitration Procedure, they are manifesting a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators." ***Id.*** at 1312-13. ***Freel***, however, is more of a broadside fired by the defendants which misses its mark. Whether or not ***Freel*** requires a federal court in the Eighth Circuit to send the question of arbitrability to the NASD in a given case is irrelevant if the case is improperly before a federal court.

At this point there is one, and only one, issue for the court's resolution. The court must decide, not ***whether*** the NASD should decide the question of arbitrability, but rather, ***which court*** must decide whether the NASD should decide the question of arbitrability. It is elementary that the party asserting federal subject matter jurisdiction has the burden of establishing jurisdiction, in this case the removing defendants. Generally, federal jurisdiction must be apparent from the face of the plaintiffs' well-pleaded complaint; a federal defense that the defendants may raise does not invoke federal jurisdiction. ***See Franchise Tax Bd. v. Construction Laborers Vacation Trust***, 463 U.S. 1, 9-10 (1983). **See generally** 14A C. Wright, A. Miller & E. Cooper, ***Federal Practice and Procedure*** § 3722

(2d ed. 1985) and 13B C. Wright, A. Miller & E. Cooper, ***Federal Practice and Procedure*** §§ 3562, 3566 (2d ed. 1984).

The defendants essentially assert four separate "bases" for establishing federal subject matter jurisdiction over the instant dispute: 1) the Federal Arbitration Act (FAA) coupled with interstate commerce concerns, 2) the NASD rules, 3) ERISA, and 4) the underlying issues of the dispute. The court will address each of these arguments ***seriatim.***

A. Federal Arbitration Act (FAA)

The defendants concede that the FAA, standing alone, does not confer federal question jurisdiction. See Defendants' Surreply Brief at 5. However, they argue that "the FAA, when combined with commercial interests, does create federal question jurisdiction." ***Id.*** The removal jurisdiction of the federal courts must be strictly construed. **See *Shamrock Oil & Gas Corp. v. Sheets,*** 313 U.S. 100, 108-09 (1941); **see also *Continental Ozark, Inc. v. Fleet Supplies, Inc.,*** 908 F. Supp. 668, 670 (W.D. Ark. 1995); ***Iowa Comprehensive Petroleum Underground Storage Tank Fund Board 990C80656 v. Amoco Oil Co.,*** 883 F. Supp. 403, 407 (N.D. Iowa 1995). The court is unable to extend federal question jurisdiction over this case on the speculative basis that the United States Supreme Court ***may*** choose to exercise jurisdiction on this basis in the future.

B. NASD Rules

The determination of whether or not this claim is arbitrable will turn on the interpretation of the NASD rules. The defendants argue that such an interpretation is a federal question; the court disagrees. Although the Eighth Circuit has yet to rule upon whether or not these rules can confer federal subject matter jurisdiction, the court feels confident that it would reach the same conclusion as that of the Northern District of Texas in ***Lange v. H. Hentz & Co.***, 418 F. Supp. 1376, 1380 (N.D. Tex. 1976) (A breach of NASD rules "does not present a question which arises under the laws of the United States."). **See also *Ford v. Hamilton Investments, Inc.***, 29 F.3d 255 (6th Cir. 1994); ***Nelson v. Hench***, 428 F. Supp. 411, 420 (D. Minn. 1977) (The NASD rules do not "form the basis of a private remedy."); ***Raymond James & Assoc. v. Nat'l. Assoc. of Securities Dealers, Inc.***, 844 F. Supp. 1504 (M.D. Fla. 1994); ***In re Prudential Securities, Inc.***, 795 F. Supp. 657, 659 (S.D.N.Y. 1992) ("NASD rules are established and enforced by a private association and do not give rise to federal question jurisdiction."). Accordingly, the court does not find there to be federal subject matter jurisdiction on the basis of the NASD rules.

C. ERISA

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, preempts "every state law that 'relate[s] to' an employee benefit plan governed by ERISA." ***FMC Corp. v. Holliday***, 498 U.S. 52, 58 (1990), **quoting** 29 U.S.C. § 1144(a); **see also *Minnesota Chapter of Associated Builders and Contractors, Inc. v.***

Minnesota Dept. of Labor and Industry, 47 F.3d 975, 978 (8th Cir. 1995). " 'Relates to' has been read expansively." ***Bartholet v. Reischauer A.G. (Zurich)***, 953 F.2d 1073, 1077 (7th Cir. 1992), **citing** ***Shaw v. Delta Air Lines, Inc.***, 463 U.S. 85 (1983); **also citing** ***Ingersoll-Rand Co. v. McClendon***, 111 S. Ct. 478 (1990).

A claim which involves ERISA issues without expressly acknowledging the statute can still be governed by ERISA and its preemption clause. ***See Vickery v. United Medical Resources, Inc.***, 43 F.3d 1208 (8th Cir. 1994). However, "[n]otwithstanding its breadth, [the Supreme Court] has recognized limits to ERISA's preemption clause." ***Ingersoll-Rand Co. v. McClendon***, 498 U.S. 133, 139 (1990). "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." ***Shaw***, 463 U.S. at 100 n.21, **citing** ***American Telephone and Telegraph Co. v. Merry***, 592 F.2d 118, 121 (2d Cir. 1979).

The state law in question for the instant dispute is Nebraska's Uniform Declaratory Judgments Act (NUDJA), Neb. Rev. Stat. §§ 25-21,149, *et seq.* The United States Supreme Court has held ERISA preemption inapplicable to "a generally applicable statute that makes no reference to, [and] indeed functions irrespective of, the existence of an ERISA plan." ***Ingersoll-Rand Co.***, 498 U.S. at 139. The NUDJA is just such a law. Having examined the record in the instant case, the court finds that this action impacts an ERISA plan in "too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." ***Shaw***, 463 U.S. at 100 n.21, **citing** ***American Telephone and Telegraph Co. v. Merry***, 592 F.2d

118, 121 (2d Cir. 1979). Accordingly, the court finds no basis for federal question jurisdiction pursuant to ERISA.

D. Underlying Issues of the Dispute

The plaintiffs are asking the court to order the NASD arbitration of a dispute between the parties. Analyzing the propriety of federal question jurisdiction in this context does not permit the court to inquire as to the substantive nature of the underlying dispute.

> Under the well-pleaded complaint rule, a suit does not come within the federal question jurisdiction unless a proper statement of the relief sought would necessarily include reference to federally created rights. . . . The nature of the underlying dispute . . . is not part of a well-pleaded complaint asking the court to order arbitration . . .

Drexel Burnham Lambert, Inc. v. Bock, 696 F. Supp. 957, 963 (S.D.N.Y. 1988). The only issue raised in the plaintiffs' petition (Filing No. 1, Exhibit A) and the defendants' answer and counterclaim (Filing No. 1, Exhibit B) appears to be the enforceability of certain arbitration agreements signed by the parties. Actually deciding the merits of the underlying dispute is unnecessary to affording complete relief to the parties. Accordingly, the court will not look to the underlying merits of this case and finds this to be an inappropriate method of asserting federal question jurisdiction.

Having now examined the various bases for exercising federal subject matter jurisdiction over this dispute,

the court finds that the defendants have failed to carry their burden of establishing jurisdiction. Accordingly,

IT IS ORDERED:

1. The plaintiffs' motion to remand made pursuant to 28 U.S.C. § 1447(c) (Filing No. 5) is granted and this case is remanded to the District Court of Douglas County, Nebraska.

2. The defendants' motions for oral argument (Filing Nos. 8, 15 and 17-2) are denied.

3. The defendants' motion to amend the notice of removal (Filing No. 16) is denied.

4. The defendants' motion to add new authority (Filing No. 17-1) is granted.

5. Pursuant to NELR 72.3 any appeal of this Memorandum and Order shall be filed with the Clerk of the Court within ten (10) days after being served with a copy of this Memorandum and Order. Failure to timely object may constitute a waiver of any such appeal. The brief in support of any appeal shall be delivered to Chief Judge William G. Cambridge at the time of filing such appeal. Failure to submit a brief in support of any appeal may be deemed an abandonment of the appeal.

6. The Clerk is ordered to withhold the transmittal of this file to the District Court of Douglas County until **August 23, 1996**. Should an appeal be filed in accordance with NELR 72.3, the transmittal of the file shall await the resolution of such appeal.

DATED this 6th day of August, 1996.

BY THE COURT:

/s/ Thomas D. Thalken
THOMAS D. THALKEN
United States
Magistrate Judge

Paragraph 13 of the Client's Agreement provides:

" . . . Any controversy arising out of or relating to my accounts, to transactions with you, your officers, directors, agents, and/or employees for me, or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect of the National Association of Securities Dealers, Inc . . . "

¶ 3715 Time Limitation Upon Submission

Sec. 15. No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

[Amended effective October 1, 1984.]

CASE SYNOPSIS

1. **NASD Arbitration Claim**
   December 1995
   - ERISA Claims
   - Common Law Fraud

2. **"Answer" – State Court Action**
   - Interpret § 15, NASD Arbitration Rule

3. **1st Case (Federal)**
   March, 1996 – 8:CV96-178
   - Removal
   - "Relates to" ERISA, 29 U.S.C. § 1144(a)
   - Remanded – No ERISA (District Court)

4. **2nd Case (Federal)**
   October, 1996 – 8:CV96-545
   Count I – ERISA Violations under 29 U.S.C. §§ 1104 & 1132(e)
   Count II – Compel Abritration under 9 U.S.C. § 4
   - Dismissed – See Case 8:CV96-178

5. **Appeal – Eighth Circuit**
   March, 1997
   - Dismissed – 8:CV96-178 (State Contract Action)
   - Collateral Estoppel for 8:CV96-545 (ERISA Action)